Office-Supreme Court, U.S.
FILED
JUL 29 1968
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 348,

IN THE MATTER OF
WILLIAM E. THORESEN, III,
Petitioner

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

LEWIS ROCA BEAUCHAMP & LINTON
By John P. Frank
John J. Flynn
Richard T. Treon
114 West Adams Street
Phoenix, Arizona 85003

OF COUNSEL:

FORD AYER HORAN & LESTER
By Peyton Ford
Urban A. Lester
1000 Connecticut Avenue
Washington, D. C. 20036

RUDMAN, RUDMAN & CARTER
By Gene Carter
96 Harlow Street
Bangor, Maine 04401

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	9
APPENDIX A—Opinion of First Circuit Court of Appeals	10
B—Decision of Maine State Supreme Judicial Court	14
C—Order of United States District Court Northern Division of Maine	18

TABLE OF AUTHORITIES

Cases:	Page
Ahrens v. Clark, 335 U.S. 188, 68 S. Ct. 1443, 92 L. Ed 1898 (1948)	5, 6, 7, 8
Burgett v. Texas, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967)	4
Burwell v. People, 350 U.S. 10, 76 S. Ct. 31 (1955)	1
Carbo v. United States, 364 U.S. 611, 81 S. Ct. 338, 5 L. Ed. 2d 329 (1961)	5, 7
Ex Parte Endo, 323 U.S. 283, 65 S. Ct. 208, 89 L. Ed. 243 (1944)	6, 7
Jones v. Cunningham, 371 U.S. 236, 83 S. Ct. 373, 9 L. Ed. 2d 285 (1963)	7
McGowan v. Moody, 22 App. D.C. 148 (D.C. Cir. 1903)	5
Peyton v. Rowe, ____ U.S. ____, 88 S. Ct. 1549 (1968)	8
William E. Thoresen, III v. State of Maine, No. 203, October Term, 1968	4
United States ex rel LaNear v. Lavallee, 306 F. 2d 417 (2d Cir. 1962)	6
United States v. Hayman, 342 U.S. 205, 72 S. Ct. 263, 96 L. Ed. 225 (1952)	7, 8
Statutes:	
15 U.S.C. Sec. 902(e) (Federal Firearms Act)	2, 3
28 U.S.C.	
Sec. 1254(1)	1
Sec. 2241	5
Sec. 2241(a)	2, 6

TABLE OF AUTHORITIES (Cont'd)

Sec. 2241(c)(1)(2)(3) 2

Sec. 2253 2

United States Constitution:

Sixth Amendment 3

Fourteenth Amendment 3

Other:

American Bar Association's *Standards Relating to Post-Conviction Remedies* 6

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. _____,

IN THE MATTER OF

WILLIAM E. THORESEN, III,

Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

This is a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on May 13, 1968, with a *per curiam* addendum on May 24, 1968.

OPINIONS BELOW

The opinion of the First Circuit Court of Appeals (Appendix A) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals denying a certificate of probable cause in a habeas corpus case was entered on May 13, 1968, with a *per curaim* addendum on May 24, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1). See *Burwell v. People,* 350 U.S. 10, 76 S. Ct. 31 (1955).

QUESTION PRESENTED

The ultimate question presented in this case is whether the writ of habeas corpus is available in any court, state or federal, to review the validity of a state criminal conviction obtained in violation of specific federal constitutional rights after the defendant has completely served his sentence or paid his penalty. The more immediate question in the instant case is whether the issue of alleged constitutional deficiency of a fully served prior state conviction can be raised through habeas corpus in the Federal District Court of the state in which the petitioner was originally convicted even though he is not under immediate peril of additional custody in that jurisdiction and he is in such peril in another jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutes principally involved are 28 U.S.C. Secs. 2241(a), (c)(1)(2)(3), 2253 and 15 U.S.C. Sec. 902(e):

"§ 2241. Power to grant writ

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.

* * * *

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

"(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

"(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States, . . ."

"§ 2253. Appeal

"In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had. . . .

"An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause."

"§ 902. Transporting, shipping, or receiving firearms or ammunition in interstate or foreign commerce; acts prohibited

* * * *

"(e) It shall be unlawful for any person who is under indictment or who has been convicted of a crime punishable by imprisonment for a term exceeding one year or who is a fugitive from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition."

STATEMENT

This matter arises from the efforts of William E. Thoresen, III to secure post-conviction review on constitutional grounds of a 1959 Maine state criminal conviction for having stolen what was in fact some $26.30 worth of travel posters from a Maine railway ferry terminal. Petitioner has consistently contended that the Maine conviction was based on a denial of his right to counsel under the Sixth Amendment to the United States Constitution, and additionally and independently, that his conviction was based upon a violation of his right to Due Process of Law under the Fourteenth Amendment in that the value of the property allegedly stolen had never in fact been ascertained by the prosecuting authorities and as a result he was charged with and pled guilty to a crime of which he was not and could not be guilty.

In 1967, six years after petitioner completed probation on the Maine state conviction, he was charged in California with violation of the Federal Firearms Act, 15 U.S.C. Sec. 902(e), for hav-

ing shipped firearms and ammunition in interstate commerce while being a person convicted of a crime punishable by imprisonment for more than one year. A necessary predicate for that charge is the existence of the earlier Maine conviction. He has diligently sought post-conviction review of that conviction:

(a) The Maine Supreme Judicial Court held that there is no post-conviction remedy in Maine available to review claimed deprivations of federal constitutional rights after a sentence is fully served. That decision (Appendix B) has been brought here in the companion case of *William E. Thoresen, III v. State of Maine,* No. 203, October Term, 1968.

(b) Petitioner then applied for a writ of habeas corpus in the Federal District Court in Maine, was denied relief (Appendix C), and applied for a certificate of probable cause to the First Circuit Court of Appeals which, sitting *en banc,* denied it. (See Appendix A.) These denials were purely on jurisdictional grounds.

(c) Petitioner also petitioned for habeas corpus in the Federal District Court in California where he is under the present criminal charge; and he also asked for a hearing on the validity of his Maine conviction in the criminal case, relying on *Burgett v. Texas,* 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967). Both the writ and the motion were denied, and the petitioner applied for a certificate of probable cause; the Ninth Circuit Court of Appeals also denied the application, again purely on jurisdictional grounds.

The foregoing will serve to give skeletal identification to the questions presented. The matter, with all relevant facts, is fully set forth in the companion petition for certiorari to the Ninth Circuit Court of Appeals which we have chosen as the principal vehicle of exposition because Mr. Justice Douglas has issued a stay in that case. We therefore ask leave to incorporate herein by reference the Statement in the Ninth Circuit case.

REASONS FOR GRANTING THE WRIT

1. Substantial jurisdictional problems common to both the First and Ninth Circuit cases are considered in the Ninth Circuit brief, which we incorporate by reference herein *in toto.*

2. But there is an additional matter of both importance and conflict. This arises because there is in this case both a *temporal* and a *geographic* question as to habeas corpus jurisdiction. The temporal question is whether the writ will lie after penalty has been paid, and the Ninth Circuit brief devotes itself to this question. Assuming that the writ will lie somewhere, the geographic or venue question is, where? 28 U.S.C. Sec. 2241 provides that "writs of habeas corpus may be granted by [the courts] within their respective jurisdictions." The Maine Federal District Court apparently concluded that it lacked geographic jurisdiction because it found petitioner "not confined, detained, or otherwise restrained of his liberties within the territorial limits of the District of Maine," citing principally *Ahrens v. Clark,* 335 U.S. 188, 68 S. Ct. 1443, 92 L. Ed. 1898 (1948). The Court of Appeals made this explicit, saying that even if the California prosecution provided "custody," "jurisdiction would not lie in the District of Maine," also citing *Ahrens v. Clark.*

3. *Ahrens v. Clark* holds that as between the jurisdiction in which the captive is located (Ellis Island) and the jurisdiction in which his captor (Attorney General) is located (Washington, D. C.), jurisdiction attaches to the district of the captivity. The Court stated:

> "The jurisdiction of the District Court to issue a writ in cases such as this is restricted to those petitioners who are confined or detained within the territorial jurisdiction of the court . . ." 335 U.S. at 192.

See *McGowan v. Moody,* 22 App. D. C. 148 (D.C. Cir. 1903); and see also *Carbo v. United States,* 364 U.S. 611, 81 S. Ct. 338, 5 L. Ed. 2d 329 (1961).

These cases deal with the question of choice between the place of the captor and the place of the captive. They do not deal directly with the problem presented in the instant case. On the merits, we ask the Court to adopt the view of the American Bar Association's *Standards Relating to Post-Conviction Remedies* which provides that,

> "the availability of post-conviction relief should not be dependent upon the applicant's attacking a sentence of imprisonment then being served or other present restraint." (Sec. 2.3, p. 40, *Tentative Draft,* 1967.)

If the petitioner is freed from the test of incarceration, then geographically the locus of the petitioner must be placed in one or more places, and yet there is not in the sense of physical confinement either a captive or a captor.

A proper place, if not necessarily the only place, to bring the action is in the jurisdiction where the sentence was originally imposed and the penalty served.* The critical language of 28 U.S.C. Sec. 2241(a) is that the writ may be granted by the various federal courts "within their respective jurisdictions." Certainly a highly desirable place to review a Maine conviction and a Maine penalty is in Maine and, if there is no state remedy, in the Maine district court.

Under the rationale of *Ahrens v. Clark, supra,* Maine is a proper forum. In choosing between the location of the captive

---

*A leading case involving federal habeas corpus challenging a recidivist sentence in state A which was based on an earlier sentence in state B is *United States ex rel LaNear v. LaVallee,* 306 F.2d 417 (2d Cir. 1962). Petitioner challenged the constitutional validity of the earlier conviction. The court, considering the pros and cons of requiring the challenge to be made in the state in which the conviction took place, here held that in all the circumstances the state of the second conviction was superior. It found that the immediate denial of due process is in the second jurisdiction, for it is using an unconstitutional earlier decision to reach a result within its borders.

and the location of the captor, the Court there applied the standard of practical administration of justice. Because maximum convenience would be served and because maximum effectiveness of the remedy would be promoted, the Court selected the location of the captive. Those identical factors apply in the instant case since every single element relevant to the determination of the substantive issues presented is to be found in Maine.

4. The decision below conflicts with geographical criteria suggested in opinions of this Court. In *Ex parte Endo,* 323 U.S. 283, 65 S. Ct. 208, 89 L. Ed. 243 (1944), where the party had been moved after the action had been instituted, the Court held that there was jurisdiction in the place of the original captivity, despite the fact that he was no longer physically restrained there.

Moreover, this Court has held that, where there is an appropriate respondent, habeas corpus will lie even though petitioner is not incarcerated. In *Jones v. Cunningham,* 371 U.S. 236, 83 S. Ct. 373, 9 L. Ed. 2d 285 (1963), petitioner had been confined in a Virginia penitentiary, was placed on parole, and directed to live in Georgia with his family. Even though the habeas corpus action was filed in Virginia, the Court found jurisdiction there:

> "Respondent also argues that the District Court had no jurisdiction because the petitioner had left the territorial confines of the district. But this case is not like *Ahrens v. Clark,* [citation] upon which respondent relies, because in that case petitioners were not even detained in the district when they originally filed their petition. Rather, this case is controlled by our decision in *Ex parte Endo,* [citation] which held that a District Court did not lose its jurisdiction when a habeas corpus petitioner was removed from the district *so long as an appropriate respondent with custody remained.* Here the members of the Parole Board are still within the jurisdiction of the District Court, and they can be required to do all things necessary to bring the case to a final adjudication." 371 U.S. at 243-44. (Emphasis added).

See also *Carbo v. United States, supra,* in which the Court gave as one ground for its decision that the petitioner had originally been indicted in California. Hence, relying upon *Ex parte Endo, supra,* the place of origin was thus made an independent ground for the result. See 364 U.S. at 621-22.

Territorial jurisdiction may be satisfied by the *presence* rather than confinement of the petitioner, although presence may be joined with his having been convicted and having paid his penalty in the location where he makes his presence available. *Ahrens v. Clark, supra,* has been construed by the Court in *United States v. Hayman,* 342 U.S. 205, 220, 72 S. Ct. 263, 96 L. Ed. 225 (1952), in the following manner:

> "in *Ahrens v. Clark* . . . we held that the phrase 'within their respective jurisdictions' in the habeas corpus statute required the *presence* of the petitioner within the territorial jurisdiction of the district court as a prerequisite to his filing an application for habeas corpus." (Dictum) (Emphasis added).

5. The geographical question has been important, important enough to have occupied the attention of this Court repeatedly. But it attains new importance in the light of the recent decision in *Peyton v. Rowe,* 390 U.S. ____, 88 S. Ct. 1549 (1968). *Rowe* permits habeas corpus to challenge a future sentence on a past conviction by a person presently incarcerated. This Court must decide, however it is to be decided, whether the petition will lie in the state of present custody or in the state of original conviction. We submit that in at least some instances, as where many witnesses are involved, the place of original conviction may be preferable.

CONCLUSION

For all of the foregoing reasons therefore, petitioner respectfully requests that the writ of certiorari should be granted.

Respectfully submitted,

LEWIS ROCA BEAUCHAMP & LINTON
John P. Frank
John J. Flynn
Richard T. Treon
114 West Adams
Phoenix, Arizona 85003

RUDMAN, RUDMAN & CARTER
Gene Carter
Bangor, Maine

OF COUNSEL:

FORD AYER HORAN & LESTER

Peyton Ford
Urban A. Lester
1000 Connecticut Avenue
Washington, D. C.
July, 1968

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Misc. No. 263.

In the Matter of
WILLIAM E. THORESEN, III,
PETITIONER.

OPINION ON APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE TO APPEAL

Before ALDRICH, *Chief Judge*,
MCENTEE and COFFIN, *Circuit Judges*.

Gene Carter, John P. Frank, John J. Flynn, Eliot Feldman, Rudman, Rudman, & Carter and *Lewis, Roca, Beauchamp & Linton* on application for petitioner.

May 13, 1968.

ALDRICH, *Chief Judge*. This is a request for a certificate of probable cause for appeal from an order of the District Court for the District of Maine dismissing an application for a writ of habeas corpus for lack of jurisdiction. A somewhat detailed recitation of facts is called for.

In September 1959, when petitioner was 21 years old, he stole six posters from the Bar Harbor, Maine, terminal of the Canadian National Railway's Nova Scotia ferry. He was apprehended and jailed for want of bail. Thereafter he waived indictment. The waiver which he executed recited that he was charged with "[l]arceny of goods having a value in excess of One hundred dollars." On the same day he pleaded guilty to an information in

which the posters were assigned individual values, totalling an "aggregate value of one hundred and fifty dollars." Between the date of his apprehension and the date of his plea, a period of some ten days, petitioner was continuously in jail. According to affidavits accompanying the present application the following events occurred.

Petitioner employed an attorney, who in turn made contact with petitioner's father. Upon his arrival the father essentially discharged the attorney and conducted lengthy negotiations with the district attorney in the absence of counsel. The father brought with him funds sufficient to bail petitioner, but did not bail him. He informed the district attorney that he was worried about petitioner and thought that he should be treated in a mental institution; that he did not want the petitioner to know that this was the father's proposal, and that he did not want petitioner fined, but thought it best that he receive a suspended sentence and probation, as a result of which, if petitioner was released forthwith, he could return to his home in Illinois for treatment, but be under the custody of the court. After some difficulty the petitioner's father and the district attorney persuaded petitioner to plead guilty, the father informing petitioner that everything would be all right, and that he was only pleading to a "misdemeanor type" offense. Thereafter petitioner pleaded guilty, as aforesaid. He received a two-year suspended sentence, and in 1961 was discharged from the terms of his probation.

Petitioner is presently a resident of California. In 1967 he was indicted in the United States District Court in California for transporting firearms in interstate commerce having been previously "convicted of a crime punishable by imprisonment for a term exceeding one year." 15 U.S.C. § 902(e). The prior conviction relied upon is that just described. Investigation by petitioner's counsel revealed the foregoing facts, and revealed, further, that the Canadian National Railway had paid a small sum for the posters in question, $2.25 apiece for five and some $15 for the

sixth, from which it could fairly be said that by no possibility was the stolen property of a value in excess of $100. Accordingly, the larceny to which petitioner had pleaded should not have been so described, and petitioner was not in fact guilty of an offense within the ambit of section 902(e).[1]

On this basis petitioner sought postconviction relief in the State of Maine. The Maine Supreme Judicial Court dismissed for lack of jurisdiction, holding that the only relief open in that state is under its habeas corpus statute; that habeas corpus is not available when the petitioner is no longer in custody, and that no greater rights attached to the petitioner, so far as the Maine courts were concerned, by virtue of the California proceedings. The present application was then filed in the district court, and dismissed for want of jurisdiction. The district court having declined to issue a certificate of probable cause for appeal, our sole present question is whether that declination was proper.

Petitioner's difficulty is his inability to demonstrate the "custody" required by 28 U.S.C. § 2241(c) before the writ of habeas corpus can issue, a problem pointed up by his failure to name a respondent against whom the writ is to issue. We do not have merely the situation which moved a minority of the Court in *Parker v. Ellis*, 1960, 362 U.S. 574, 577 and 595 (dissenting opinions), where custody terminated during the pendency of the action, see also, *Thomas v. Cunningham*, 4 Cir., 1964, 335 F.2d 67; here there was no custody—at least so far as Maine was concerned—when the application was filed. Apparently petitioner believes that he is contesting a state interest in the light of the fact that he seeks a certificate of probable cause under 28 U.S.C. § 2253. Yet the absence of any respondent has the serious legal consequence that there was no controversy, and the serious practical effect that there was no one to contest.

---

[1] Conviction for larceny of goods whose value is less than $100 carries a maximum term of six months. Me. Rev. Stat. Ann. tit. 17, § 2101.

Petitioner also asserts the custody of the United States in connection with the proceedings pending against him in California.[2] Assuming that this be sufficient custody, *but cf. Allen v. United States,* 1 Cir., 1965, 349 F.2d 362, jurisdiction would not lie in the District of Maine. *Ahrens v. Clark,* 1948, 335 U.S. 188. While we suggest no opinion on the question, even if, as petitioner asserts, there should be nowhere that he may now seek a writ of habeas corpus, it does not necessarily follow that he is remediless so far as defending against the California indictment is concerned. *Cf. Burgett v. Texas,* 1967, 389 U.S. 109. We, of course, express no views as to the applicability of *Burgett,* or whether on the facts alleged petitioner was unconstitutionally convicted.

Certificate denied.

May 24, 1968.

PER CURIAM. On May 20 the Supreme Court overruled *Parker v. Ellis,* 1960, 362 U.S. 574, in *Carafas v. Lavallee,* 5/20/68, and decided *Peyton v. Rowe,* 5/20/68. We have reviewed these decisions and see no reason to alter ours.

---

[2] Petitioner urges that he is in a unique position under the statute as his federal custody by virtue of the indictment against him arguably places him "'in custody pursuant to the judgment of the state court' [28 U.S.C. § 2254] since the federal indictment is based upon a 1959 Maine conviction." We do not believe that this novel suggestion as to the meaning of "pursuant to" advances his case.

APPENDIX B

WILLIAM E. THORESEN, III
v.
STATE OF MAINE.

Supreme Judicial Court of Maine.

March 18, 1968.

Before WILLIAMSON, C. J., and WEBBER, TAPLEY, MARDEN, DUFRESNE and WEATHERBEE, J. J.

WEBBER, Justice.

This was a petition for post conviction relief. A motion to dismiss filed by the respondent was granted below. Dismissal was predicated upon the fact that the petitioner is not now under any actual or technical restraint in Maine. On appeal we look to the allegations of the petition to ascertain whether or not it recites valid facts which, if proven, would entitle the petitioner to relief.

The petition asserts that in 1959 the petitioner was arrested and charged with larceny of pictures. Petitioner employed an attorney to represent him. Thereafter petitioner elected to plead guilty to an information charging him with the larceny of six pictures, each separately described and valued, but "all in the aggregate value of one hundred and fifty dollars." He was thereupon sentenced as for a felony but the sentence was at once suspended and he was placed on probation for a period of two years. He was permitted to leave the State of Maine. The terms of his probation were properly complied with and the probation was formally terminated by the Superior Court in 1961. In 1967 the petitioner was indicted in the Federal District Court in California for an alleged violation of Title 15, U.S.C., Sec. 902(e). An element of the crime charged is that the petitioner is a person previously convicted in Maine of a crime punishable by a prison term in excess of one year. In order to set aside the Maine con-

viction, petitioner now seeks an opportunity to prove that the pictures stolen in Maine in 1959 had a value not in excess of twenty-six dollars and that this fact was then unknown to petitioner. In effect petitioner seeks to prove that he did not know or understand that he was pleading guilty to a felony and would not have so pleaded if he had understood the nature of the charge.

By P.L.1963, Ch. 310, Sec. 1 the Legislature enacted a comprehensive postconviction relief statute which now appears in the statutes at 14 M.R.S.A. §§ 5502 to 5508 inclusive. That this remedy was intended to be the sole and exclusive method of collateral attack upon the legality of a conviction and sentence was clearly stated by the statute itself. § 5502 provides in part:

> "The remedy of habeas corpus provided in sections 5502 to 5508 is not a substitute for nor does it affect any remedies which are incidental to the proceedings in the trial court, or any remedy of direct review of the sentence or conviction but, except as otherwise provided in sections 5502 to 5508, *it comprehends and takes the place of all other common law remedies which have heretofore been available for challenging the validity of a conviction and sentence and shall be used exclusively in lieu thereof.*" (Emphasis ours)

Moreover, the remedy formerly afforded by the writ of error coram nobis as understood and recognized in this state was incorporated into Sec. 5502 in these terms, "* * * or that there were errors of fact not of record which were not known to the accused or the court and which by the use of reasonable diligence could not have been known to the accused at the time of trial and which, if known, would have prevented conviction, * * *." We are satisfied that the common law writ of error coram nobis recognized as available to a petitioner under custodial restraint in Dwyer v. State (1956) 151 Me. 382, 120 A.2d 276 ceased to exist when it was superseded by the "coram nobis" statute enacted by the Legislature in P.L. 1961, Ch. 131. See Bennett v. State of Maine et al. (1956) 161 Me. 489, 493, 214 A.2d 667, 670. This statute,

then R.S. 1954, Ch. 126—A, was in turn repealed by Sec. 5 of P.L. 1963, Ch. 310, the chapter which simultaneously enacted the post-conviction relief statute in its present form.

Is the remedy afforded by 14 M.R. S.A. §§ 5502 to 5508 available to a petitioner who admittedly is presently under no form of restraint in Maine? We think not. Sec. 5502 itself limits availability in these terms:

> "Any person convicted of a crime and incarcerated thereunder including any person committed as a juvenile offender, or released on probation, or paroled from a sentence thereof, or fined, * * * may institute a petition for a writ of habeas corpus * * *."

Clearly the statute contemplates either a presently existing actual or physical restraint or a technical hold or restraint which under appropriate circumstances (as for example by violation of probation or parole or non-payment of fine) could be converted to a physical restraint. No doubt the requirement stems from a legislative judgment that litigation must eventually come to an end and the dockets of the courts must not be clogged with stale claims. We recognized the statutory requirement when we said in Longway v. State of Maine et al. (1965) 161 Me. 430, 432, 213 A.2d 519, 520, "He has satisfied the sentence imposed for larceny and any issue sought to be raised with respect to the trial upon the larceny indictment is of course now moot." In the very recent case of Green v. State of Maine et al., Me., 237 A.2d 409 (Opinion January 23, 1968) we liberally construed the statute to permit its use by one under actual restraint in Maine in execution of a sentence imposed under the so-called "habitual criminal" statute (15 M.R.S.A. § 1742), it being alleged that there had been an unconstitutional deprivation of counsel at the time of a prior Maine conviction. We held that the existing restraint was "directly attributable to the enhancement of the larceny sentence by application of the recidivist statute." We emphasize, however, that in Green there was the presently exist-

ing restraint in Maine which the post-conviction habeas corpus statute in clear and unambiguous terms requires as a prerequisite to relief. The absence of any form of continuing restraint in the instant case is fatal to the petitioner's claim.

Appeal denied.

WEATHERBEE, J., did not sit.

DUFRESNE, J., sat at argument but did not participate in this decision.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE
NORTHERN DIVISION

IN THE MATTER OF THE APPLICATION OF WILLIAM E. THORESEN, III Petitioner	Application for Writ of Habeas Corpus CIVIL NO. 1721

ORDER

Upon consideration of the above entitled application for a Writ of Habeas Corpus filed April 2, 1968, I find that I am without jurisdiction to entertain the application for the reason that it appears from the application and its accompanying papers that the applicant is not confined, detained or otherwise restrained of his liberty within the territorial limits of the District of Maine. *Ahrens v. Clark,* 335 U.S. 188 (1948); *Parker v. Ellis,* 362 U.S. 574 (1960); *Duncan v. Maine,* 195 F. Supp. 199 (D. Me. 1961); see *Carbo v. United States,* 364 U.S. 611, 619-620 (1961).

IT IS THEREFORE ORDERED that the application is dismissed and the writ denied.

Dated at Bangor, Maine this 11th day of April, 1968.

/s/ Edward T. Gignoux

Judge, United States District Court

A TRUE COPY
ATTEST: MORRIS COX, CLERK